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No. 94-24

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

L.K. COMSTOCK & COMPANY, INC., ET AL.,
Petitioners,

V.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER the Court of Appeals for the Fifth Circuit was correct in affirming the district court's denial of Petitioners' Motion to Amend Judgment to enforce a Federal Rules of Civil Procedure Rule 68 Offer of Judgment where the plaintiff-offeree, LP&L, did not obtain a judgment against the defendant-offerors, Comstock and LKC.

II. WHETHER attorneys' fees are recoverable as an element of costs under a Rule 68 Offer of Judgment in an antitrust action.

III. WHETHER Petitioners' Rule 68 Offer of Judgment was untimely.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent, Louisiana Power & Light Company ("LP&L"), respectfully requests, for reasons explained fully below, that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, L.K. Comstock & Company, Inc. ("Comstock"), and LKC, Inc.("LKC").

Statement of the Case

On February 7, 1986, LP&L, respondent herein, commenced this action under the Sherman Act and RICO against various defendants, including petitioners, Comstock and LKC, alleging that the defendant electrical contractors who bid on the Waterford 3 Nuclear Power Plant electrical contract colluded and rigged bids.

On July 22, 1992, defendants, Comstock and LKC, mailed to LP&L an Offer of Judgment that stated that pursuant to Fed. R. Civ. P. 68, Petitioners thereby would allow judgment to be taken against them in the amount of $150,000, including interest, costs, and attorneys' fees accrued to date.[1] Appendix B, Petitioners' Brief. LP&L chose not to accept the offer.[2]

On September 25, 1992, following nearly eight weeks of trial, the district court entered Judgment in accordance with the jury's answers to the interrogatories propounded by the court. Appendix C and D, Petitioners' Brief. Although LP&L prevailed on its federal antitrust and RICO claims

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[1] Comstock further qualified its offer by stating that it was "not to be construed either as an admission that the defendants are liable in any respect in this action...."

[2] Apart from its untimely submission, *see discussion infra*, Comstock's offer failed to make separate provision for over six years' attorneys' fees incurred by LP&L in bringing the bid-riggers to justice. With attorneys' fees running into millions of dollars, Comstock reasonably knew that the only possible judgment that could be more favorable than its Rule 68 offer was an outright victory.

against two groups of defendants, judgment was entered in favor of Petitioners herein, Comstock and LKC, dismissing LP&L's suit against Petitioners at LP&L's cost. *Id.*

On November 4, 1992, the district court denied Petitioners' Motion to Amend the Judgment, which requested an award of attorneys' fees pursuant to Fed. R. Civ. P. 68. Appendix E-2-3, Petitioners' Brief. The court stated that "[t]he judgment which was entered in favor of the Comstock defendants and against plaintiff Louisiana Power and Light Company awarded defendant costs as a prevailing party in accordance with Rule 54(d)." *Id.* The court further found that

> "it is clear that [Rule 68] applies only to offers made by the defendant and only to judgments obtained by the plaintiff" and that it was inapplicable when it is the defendant who obtains judgment in its favor. 450 U.S. at 352, 101 S.Ct. at 1150. Since here the Comstock defendants obtained judgment in their favor, under the *Delta Air Lines* decision, the rule does not apply. The defendants' attempts to distinguish this decision amount to a distinction with no difference.

Appendix E-3, Petitioners' Brief. The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") affirmed this holding. Appendix A, Petitioner's Brief.

Summary of the Argument

Neither lower court erred in denying Petitioners' request for costs and attorneys' fees pursuant to Fed. R. Civ. P. 68.[3] Petitioners' assertion that its Petition presents an issue of first impression represents a strained effort to avoid the unequivocal holding of *Delta Air Lines v. August*, 450 U.S. 346 (1981), that Rule 68 applies only where the offeree (LP&L) has obtained a judgment against the offeror (Comstock and LKC). Comstock and LKC's offer fails because LP&L failed to obtain a judgment against Comstock. In any event, Petitioners' offer of judgment was untimely.

Comstock and LKC fail to satisfy criteria traditionally applied by this Court in determining whether to grant a Writ of Certiorari. This case involves no conflict among the Federal Circuit Courts of Appeal; the decision is in accord with Supreme Court precedent; and this case presents no conflict of any law.

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[3] At the outset, it is doubtful that the Comstock Petitioners' arguments are even properly before this Court. Comstock postures its argument procedurally as seeking review of the Fifth Circuit's affirmance of the district court's denial of Petitioner's Motion to Amend the Judgment so as to recognize its Rule 68 Offer of Judgment. A motion to recover Rule 68 costs is not properly raised via a motion to amend under Rule 59(e), as Comstock has sought to do here. *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364 (7th Cir. 1993); *Fincher v. Keller Industries, Inc.*, 905 F.2d 691 (3d Cir. 1990).

Argument

I. Rule 68 Costs Are Not Recoverable by a Prevailing Defendant

At issue is the fourth sentence of Rule 68, which provides that the plaintiff-offeree must pay the post-offer costs incurred by the defendant "[i]f the judgment finally obtained by the offeree is not more favorable than the offer."

In *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), this Court held that this plain language, as well as the purpose and history of Rule 68, dictates that Rule 68 does not apply when a judgment is entered in favor of the defendant. This Court reasoned that the language "judgment . . . obtained by the offeree" means a judgment favorable to the offeree, and that Rule 68 is triggered only by such a judgment. *Delta*, 450 U.S. at 351-52. Because the defendant-offeror in *Delta* obtained a judgment entirely in its favor, the Court held that the defendant was not entitled to its post-offer costs under Rule 68. *Id. Accord, Equal Employment Opportunity Comm'n v. Bailey Ford, Inc.*, 26 F.3d 570, 571 (5th Cir. 1994) (defendant could not invoke Rule 68 where judgment was in favor of defendant because defendant did not "obtain" a judgment); *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364 (7th Cir. 1993) (same); *London v. Hunt*, 938 F.2d 450, 451-52 n. 1.(3d Cir. 1991); *Fincher v. Keller Indus., Inc.*, 905 F.2d 691, 692 (3d Cir. 1990); *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982); *Trent v. Parkview Metals Products*, 157 F.R.D. 45, 47 n. 3

(N.D. Ill. 1994); *Ezelle v. Bauer Corp.*, 154 F.R.D. 149, 152-53 (S.D. Miss. 1994); *Woern v. K Mart Corp.*, 131 F.R.D. 98, 99 (E.D. Pa. 1990); *Trohoske v. McDonough Power Equipment Co.*, 118 F.R.D. 425, 426 (W.D. Pa. 1988); *Roberts v. Homelite Div. of Textron, Inc.*, 117 F.R.D. 637, 639 (N.D. Ind. 1987); *Sack v. Carnegie Mellon Univ.*, 106 F.R.D. 561, 563 (W.D. Pa. 1985).

It matters not, as Petitioners argue, whether a case involves one defendant, like *Delta*, or whether a case involves one plaintiff and multiple defendants where the plaintiff obtained a favorable judgment against some co-defendants but not the offering defendants, like the case at hand. Rule 68 only applies to those situations where the offering defendant loses, but suffers judgment in an amount less than that offered. *Delta*, 450 U.S. at 351-52.

The purpose of Rule 68 is to encourage litigants to settle. *Delta*, 450 U.S. at 352. By providing that a defendant will be awarded costs if the plaintiff is awarded less than that offered by the defendant, Rule 68 provides the defendant with a strong incentive to offer a fair settlement. "[I]t does the defending party no good to make an offer of judgment that is not what the claimant might reasonably be expected to recover; he will not free himself of the costs if the judgment recovered is more than the offer." 12 C. Wright & A. Miller, Federal Practice and Procedure § 3001, p. 56 (1973).

Similarly, a plaintiff has little incentive to settle where a finding of liability is probable, inasmuch as a prevailing plaintiff will likely obtain all of its costs pursuant to Rule

54(d).[4] Rule 68 provides an incentive to settle by withholding from the plaintiff "some of the benefits of victory if its recovery is less than the offer." *Delta*, 450 U.S. at 352. *See also Johnston v. Penrod Drilling Co.*, 803 F.2d 867, 869 (5th Cir. 1986).

The crux of the *Delta* holding was that, in order for Rule 68 to apply, the offeree must have obtained a judgment against the offeror. *Delta*, 450 U.S. at 352. If that initial requirement is met, the court then weighs the offerors' offer against the judgment obtained by the offeree to determine if that judgment is "not more favorable than the offer." *Id.* Petitioners urge this Court to make a nonsensical comparison: their position is that the court must weigh the offerors' offer against the judgment obtained against the defendants other than offerors. Obviously, this would amount to a comparison of apples to oranges.

Rule 68 "is a mandatory rule to be narrowly applied." *Johnston v. Penrod Drilling Co.*, 803 F.2d 867, 869 (5th Cir. 1986). The Rule has a limited applicability in that Rule 68 was designed to encourage settlement "in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain." *Delta*, 450 U.S. at 352.

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[4] Where a statute underlying a plaintiff's cause of action provides for the award of costs, including attorneys' fees, if plaintiff prevails, this argument applies with even more force, *i.e.*, where a finding of liability is probable and the plaintiff has little incentive to settle absent Rule 68, inasmuch as the plaintiff knows that he will be awarded costs and attorneys' fees.

"Rule 68 would provide little, if any, additional incentive if it were applied when the plaintiff loses." *Delta*, 450 U.S. at 352. Indeed, the application of Rule 68 is unnecessary in cases where the defendant wins, inasmuch as the trial judge has discretion to grant costs to the prevailing defendant under Rule 54(d).[5] *See Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364 (7th Cir. 1993). If the trial judge decides that the prevailing defendant is not entitled to costs pursuant to Rule 54(d), that defendant ought not be able to override the court's decision by invoking Rule 68 to compel an award of costs. *See Delta*, 450 U.S. at 355 n.15 (citing Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 895).

Rule 68 was never intended to be a sanction for either winning or losing, as is Rule 54(d). Rather, Rule 68 was enacted to encourage early settlements in cases where liability is apparent, but the quantum of damages is questionable. *Delta*, 450 U.S. at 352.

As Petitioners fairly admit, the district court entered

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[5] The district court did, in fact, award costs to Petitioners pursuant to Rule 54(d). Appendix D-2, E-2, Petitioners' Brief. The only costs at issue here are attorneys' fees. This fact highlights the inconsistency of Petitioners' argument. Rule 68, unlike Rule 54(d), operates to award costs to the loser. Rule 54(d) grants the court discretion to award costs to the winner. If Petitioners' arguments were correct, Rule 68 and 54 would overlap in that both would apply where the defendant won, but the judge would be without discretion to deny costs to a prevailing defendant in certain situations. This cannot have been the legislature's intent in enacting Rule 68.

Judgment in favor of Petitioners, dismissing LP&L's complaint against petitioner at LP&L's cost. Petition at 4. Because LP&L did not obtain a favorable judgment against Petitioners, Petitioners may not invoke Rule 68, and both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit were entirely correct in so holding. As the trial court recognized, Petitioners' efforts "to distinguish [*Delta*] amount to a distinction with no difference." Appendix E at E-3, Petitioners' Brief.

II. Rule 68 Does Not Require the Plaintiff to Pay the Attorneys' Fees of Prevailing Defendants in an Antitrust Action

In *Marek v. Chesney*, 473 U.S. 1 (1985), this Court allowed a losing defendant to recover attorneys' fees as an element of costs pursuant to the cost-shifting provision of Rule 68. This Court based its decision on the fact that the underlying statute, 42 U.S.C. § 1988, granted attorneys' fees to a prevailing plaintiff, holding that "all costs properly awardable in an action are to be considered within the scope of Rule 68 'costs.'" *Marek*, 473 U.S. at 9.

Petitioners' request that this Court extend its *Marek* reasoning highlights the fallacy of the argument that Rule 68 should apply even in a situation in which the defendant prevails. Section 15 of the Clayton Antitrust Act, 15 U.S.C. § 15, provides that if a plaintiff in an antitrust suit prevails, that plaintiff shall recover costs, including reasonable

attorneys' fees.

In the present case, however, LP&L did not prevail against defendant-Petitioners. In accordance with 15 U.S.C. § 15, attorneys' fees are not "costs properly awardable" in ***this*** suit and are, thus, not subject to the cost-shifting provision of Rule 68.

III. Petitioners' July 22, 1992 Offer of Judgment Proved Untimely

Although Petitioners' recitation of the facts surrounding its Rule 68 offer of judgment is essentially accurate, their effort to justify the tardiness of the offer contradicts established rules of statutory construction. Rule 68 requires that an offer of judgment be served on the plaintiff "more than 10 days before the trial begins." "[T]he 10 day limitation prescribed under Rule 68 is covered by the exclusion of intervening weekends and holidays" as provided in Rule 6(a). *Polk v. Montgomery County*, 130 F.R.D. 40, 42 (D. Md. 1990); J. Moore, *Moore's Federal Practice* ¶ 68.04 at p. 68-8 ("The ten-day period is determined in accordance with Rule 6(a), which excludes Saturdays, Sundays, and legal holidays from the computation of a prescribed period of time that is less than 11 days."). No court has ever held otherwise.

The record shows that Petitioners filed their Rule 68 offer on July 22, 1992, and the certificate of service attached thereto states that the offer was served by mail that same

date.[6] Appendix B, Petitioners' Brief.

Under Rule 6(a), the "day of the act . . . from which the designated period of time begins to run shall not be included" in the computation of time. Even if the defendants had served LP&L by mail on July 22, 1992, the ten-day notice mandated by Rule 68 had not run "before the trial began."[7] "An offer that is served less than ten days before the trial begins is untimely and will not support an award of costs under Rule 68." J. Moore, 7 *Moore's Federal Practice* ¶ 68.03 at p. 68-7.[8]

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[6] Petitioners erred by filing their unaccepted Rule 68 offer. *Kason v. Amphenol Corp.*, 132 F.R.D. 197 (N.D. Ill. 1990). *See* J. Moore, 7 *Moore's Federal Practice* ¶ 68.04 at p. 68-11.

[7] Under Fed. R. Civ. P. 6(e), "[w]henever a party has the right or is required to do some act . . . within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period." When a party serves a pleading by mail, the opposing party obviously does not receive the paper that same day. By adding three days to the date of service by mail, Rule 6(e) operates to ensure that a party is given the full benefit of the time periods prescribed by various procedural rules. Because Petitioners' offer of judgment was untimely even under the most liberal computation, LP&L need not address how Petitioners' service by mail affected the ten-day time period of Rule 68.

[8] Petitioners argue that the trial "began" on August 5, 1992, at the commencement of opening arguments rather than on August 3, 1992, on which date jury selection began. Calculating the ten-day period from the date of opening arguments rather than the day on which jury selection begins, would create too much uncertainty for offering defendants, inasmuch as one cannot pre-determine the amount of time it might take for jury selection and thus could not determine the date on which a Rule 68 must be

Indeed, Petitioners ignore the clear language of Rule 68. The second sentence of Rule 68 requires the offeree to act on the offer "***within*** 10 days after the service of the offer." (emphasis added). This provision clearly incorporates the counting mechanism established by Rule 6(a) for delays less than 11 days. Petitioners' position that the language "more than 10 days," used in the first sentence of Rule 68, implicates a different counting rule would thus create the anomaly that the offer need only be outstanding for a period less than that allowed to the offeree for acceptance.

Hence, even if Petitioners could shield their offer from *Delta*, their offer was nevertheless invalid because it was untimely.

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made. Nevertheless, even assuming as true petitioners' argument that the trial began on August 5, petitioners' offer of judgment was untimely, having been served nine days prior to the commencement of the trial.

Conclusion

Accordingly, LP&L requests that this Court deny Comstock and LKC's Petition for Writ of Certiorari. This case present no issue appropriate for the Court's review. Moreover, the lower courts' decisions were not erroneous.

Respectfully submitted,

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